85 - 1564

Supreme Court, U.S.
FILED
MAR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

CLARENCE D. CADE and
JACQUELINE S. CADE — PETITIONER

v.

UNITED STATES OF AMERICA — RESPONDENT

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

---

CLARENCE D. CADE
JACQUELINE S. CADE
1030 Bates Road
Austell, Georgia 30001
404-941-5377

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tax Equity and Fiscal Responsibility Act of 1982 runs counter to the fundamental law of the land, ie, (1) Is due process satisfied without a hearing, pursuant to Londoner v. Denver, 210 US 373; (2) Does the act violate the separation of powers doctrine?

2. Whether jury trial as a matter of right can be denied at the discretion of the court?

3. Whether "frivolous" and "bad faith" can be applied to appeals which have relied on past decisions of this court pursuant to United States v. Bishop, 412 US 346.

4. Whether wages are income as defined by this court.

## TABLE OF CONTENTS


| | Pages |
|---|---|
| Questions presented for review | 1 |
| Table of contents | 2 |
| Table of Authorities | 2,3 |
| Opinion below | 4 |
| Jurisdiction | 5 |
| Constitutional provisions involved | 6 |
| Statement of the case | 7 |
| Reasons for granting the Writ | 8 |
| Appendixs A, B, C | Apdx |
| Proof of service | |


## TABLE OF AUTHORITIES


| | |
|---|---|
| Alyeska Pipe. Ser. v. Wilderness Soc. 421 US 240 | 20 |
| Analytica, Inc. v. NPD Research 708 F2d 1263 | 20 |
| Badillo v. Central Steel & Wire 717 F2d 1160 | 20 |
| Bates v. Kimball, 2D Chip (Vt) 77 | 12 |
| Bowers v. Kerbaugh-Empire, 271 US 170 | 25 |
| Boyd v. U.S., 116 US 635 | 11 |
| Brown v. Levee Comm., 50 Miss 468 | 9 |
| Brushaber v. U.P. RR Co, 240 US 1 | 23 |
| Central Ill. Publ. Ser. v. U.S. 435 US 3 | 25 |
| Dartmouth College Case, 4 Wheat (US) 518 | 10 |
| Demick v. Schiedt, Supra at 486 | 16 |
| Eisner v. Macomber, 252 US 189 | 23,24 |
| Ficalora v. Comm., 751 F2d 85 | 22 |
| Goldberg v. Kelly, 397 US 254, 271 | 16 |
| Goodrich v. Edwards, 255 US 527 | 24 |
| Granzow v. C.I.R., 739 F2d 265 | 22 |
| Graves v. People of the State of N.Y. 306 US 466 | 26 |

## TABLE OF AUTHORITIES

(Cont.) Pages


Helvering v. Edis. Bros. Stores, 133 F2d 575 24
Londoner v. Denver, 210 US 373 1,8
Lonsdale v. C.I.R., 661 F2d at 72 18
Lucas v. Earl, 281 US 111 25
Mathes v. C.I.R., 576 F2d 70 26
Miranda v. Arizona, 384 US 436 9
Mugler v. Kansas, 123 US 623, 661 11
Parker v. Comm., 724 F2d 469 26
Parklane Hosiery Co. v. Shore, 439 US 322 14
Phillips v. Comm., 283 US 589 10
Shaffer v. Carter, 252US 37, Supra 23
Southern Pacific v. Lowe, 247 US 330 23
Stanton v. Baltic Min. Co., 240 US 103 23,27
State v. Doherty, 60 Me. 504, 509 9
State v. Noble, 21 NE 244 12
Teis v. Smuggler Min. Co., 158 F. 260 16
U.S. v. Ballard, 535 F2d 400, 404 24
U.S. v. Bishop, 412 US 346 1,20
U.S. v. Francisco, 614 F2d 617 26
U.S. v. Romero, 640 F2d 1014 22
Wright v. Defrees, 8 Ind. 298 12


Miscellaneous:


United States Constitution - A. III, S. 1, Amend. V, Amend. VII. 6
Corpus Juris Secundum 88, S.202 15,21
16 Am. Jur. 2d Sec. 328 11
Federalist Papers 12
Trial By Jury - Lysander Spooner 13
26 U.S.C. S. 6702 6,8
S. 6703(a) 18
28 U.S.C. S. 1346 S. 2402 14
Federal Rules of Civil Procedure 12(b)(6) 15
38(a) 14


Also:


Wyandotte Chemical Corp. v. City of Wyandotte, 321 F2d 927. 5

## OPINION BELOW

The District Court for the Northern District of Georgia issued its order granting the defendant's motion for summary judgment on April 30, 1985. A copy of the order is attached as Appendix A.

The judgment of the 11th Circuit Court of Appeals entered November 5, 1985 upheld the decision of the district court. A copy of the order is attached as Appendix B.

The appellate court denied a suggestion for rehearing en banc on December 12, 1985. A copy of the order is attached as Appendix C.

## JURISDICTION

On November 5, 1985, the 11th Circuit Court of Appeals issued judgment affirming the judgment of the District Court for the Northern District of Georgia. (App. B) Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254. In Note 39, certiorari was granted to determine whether decisions of Federal Courts were in conformity with prior Supreme Court decision. Certiorari was conferred on this court to guard against any injurious results. And in Note 201, If Federal questions are involved whereby taxpayer is denied his constitutional right, cause may be taken to Supreme Court of the United States for review. Wyandotte Chemical Corp. v. City of Wyandotte, 321 F2d 927.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. III, S. 1.

> The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.

United States Constitution, Amendment V.

> Nor shall any person...be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VII.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...

26 United States Code, S. 6702.

> (a) Civil penalty -If-any individual files what purports to be a return of the tax imposed by subtitle A but which does not contain information on which the substantial correctness of the self-assessment may be judged, or contains information that on its face indicates that the self-assessment is substantially incorrect; and the conduct referred to in paragraph (1) is due to a position which is frivolous, or a desire (which appears on the pur-return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.

## STATEMENT OF THE CASE

An original complaint was issued by the Appellants to determine their liability for TEFRA penalty under section 6702 of the Internal Revenue Code. The Appellants filed an appeal from the U. S. District Court for the Northern District of Georgia to the Eleventh Circuit Court of Appeals on the 29th day of May, 1985 contesting the order of Judge G. Ernest Tidwell, finding the Appellants' action frivolous and declaring summary judgment. After depositing the Appellants' brief with the circuit court on the 26th day of July, 1985 and reply brief on the 6th day of September, 1985, the court before Circuit Judges Roney, Henderson and Hatchett passed judgment on the 5th of November, 1985, upholding the district court and awarding the Appellee double costs plus reasonable attorney's fees. The Appellants petition for en banc consideration was denied on December 12, 1985. The basis for federal jurisdiction in the district court was 28 USC 1331.

## REASONS FOR GRANTING THE WRIT

The petitioners initiated this action (recovery and abatement of administrative fines) in the sincere belief that their rights had been violated, and this violation was further magnified by subsequent post-assessment actions of the district court and appeals court in our judicial review. The petitioners relied on Londoner v. Denver, 210 US 373, which states:

> "It is necessary that a taxpayer be afforded a hearing, of which he must have notice, and this requirement is not satisfied by the mere right to file objections in writing."

At no time during the petitioners entire administrative and judicial review have they been tendered a hearing. The entire process of a single government agent (IRS) leveling fines without any restraints, any requirements of notice, opportunity to appear before an administrative hearing, inherently violates the due process provisions of the 5th Amendment to the U. S. Constitution.

Section 6702 of the Internal Revenue Code of 1954 was enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),

Pub. L. #97-248, 96 Stat. 324, in order to improve compliance with the Federal tax laws. It provided for the immediate assessment of a civil penalty of $500 against taxpayers filing tax protest documents, but nowhere in the law does it say that this penalty could be assessed before any hearing. Surely Congress was aware of Miranda v. Arizona, 384 US 436:

> "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

The amendment of due process of law is never too vague or indefinite that it cannot operate as a practical restraint on legislative powers that are absolute or despotic.

> "Due process of law was intended as a safeguard against the encroachment upon these inherent rights of the people by congress or state legislatures." State v. Doherty, 60 Me. 504, 509.

In Brown v. Levee Commissioners, 50 Miss. 468, speaking of the meaning of the phrase "due process of law" said:

> "It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law'."

The respondents have argued the right of the United States to collect its internal revenue by summary administrative proceedings. Phillips v. Comm., 283 US 589. But the exaction of a penalty to discourage tax protestors does not fall within the category of satisfying immediate governmental needs. The collection of taxes is not an issue here. But even if it was, the opportunity given for the ultimate judicial determination must be adequate. The adequacy of the scope of review thus far is questioned by the petitioners. Our challenge of the propriety of the fines levied against us under S. 6702 has been arbitrarily handled, causing the petitioners to feel that the corrupting and perverted influence of the Internal Revenue Service has caused the court to be a partisan advocate.

Mr Webster said of due process in the Dartmouth College Case, 4 Wheat (US) 518:

> "..a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

The petitioners were deprived of their property without due process and this constitutional guarantee was totally ignored by the

lower courts.

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty---indeed, are under a solemn duty---to look at the substance of things, whenever they enter upon the inquiry whether the legislative has transcended the limits of its authority. If therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Mugler v. Kansas, 123 US 623, 661. (Emphasis added)

And finally, the court in Boyd v. U. S., 116 US 635, said:

> "Constitutional provisions for the security of persons and property should be liberally construed. It is the duty of the courts to be watchful of constitutional rights against any stealthy encroachments thereon."

The Internal Revenue Service and the Treasury Department are not a part of the judiciary, and the power given them by congress to levy the TEFRA penalty violates the separation of powers doctrine. 16 Am. Jur. 2d Sec. 328:

> "Under the principles of powers, it is settled that the legislature may not confer judicial functions upon the members of the executive branch of government. Ministerial officers are incompetent to receive grants of judicial powers from the legislature, and their acts in attempting to exercise such powers are necessarily nummities."

In an early case it was said:

> "that no power can be properly a legislative and properly a judicial power at the same time." Betes v. Kimball, 2 D. Chip. (Vt) 77.

In TEFRA we have congress assuming that portion of authority which belongs to the courts.

> "Under the constitutional system of the United States, there is a clear and explicit separation of the duties of government in the three departments which, it has been well said, are not merely equal, they are exclusive in respect to the duties assigned to each." Wright v. Defrees, 8 Ind. 298.

Its quite clear that the other departments of government are forbidden to invade or usurp the judicial power. It is a well-settled principle that:

> "judicial functions or duties can be conferred only upon courts and judicial officers." State v. Noble, 118 Ind. 361, 21 NE 244, 10 Am. St. Rep., 143.

James Madison, in discussing this subject in the Federalist Papers, No. 48 said:

> "It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it."
>
> "..the courts were designed to be an intermediate body between the people and the legislature in order to keep the later within the limits assigned to their authority."
>
> Alexander Hamilton, No. 78, Federalists Pap.

"Liberty lies in the hearts of men and women."
Judge Learned Hand

The current status of trial by jury is outrageous. Increasingly, even after demand and appeal it is being denied. Why should a citizen depend on a public servant to guard his liberty, particularly so if such person is an adversary; ie, the judge is an employee of the respondent which removes him from the category of a fair and impartial judge. Who would not prefer the rightness or wrongness of any law or activity to be determined by a jury rather than by a politically appointed judge?

In Lysander Spooner's book Trial by Jury he observed:

> "It is supposed that, if twelve men be taken by lot from the mass of the people, without the possibility of any previous knowledge, choice, or selection of them, on the part of the government, the jury will be a fair epitome of "the country" at large, and not merely of the party or faction that sustain the measures of the government...The object of this trial "by the country", or by the people, in preference to a trial by the government, is to guard against every species of oppression by the government. In order to effect this end, it is indispensible that the people, or "the country", judge of and determine their own liberties against the government; instead of the government's judging of and determining its own powers over the people."

In Parklane Hosiery Co. v. Shore, 439 US 322, the court stated:

> "The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."

By right, the Petitioners were entitled to a jury trial, guaranteed by the 7th Amendment to the U. S. Constitution and upheld by Rule 38(a) of the Fed. R. of Civil Procedure. Section 2402 of 28 U.S.C. states:

> "Any action against the United States under Section 1346 shall be tried by the court without a jury, except that any action against the United States Under Section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury."

28 U.S.C. Section 1346 states:

> (a)The district court shall have original jurisdiction of
> (1)Any civil action against the United States for the recovery of any internal revenue tax alledged to have been erroneously or illegally assessed or collected or any penalty claimed to have been collected without authority or any sum alledged to have been excessive or in any manner wrongfully collected under the internal revenue laws.

This exception: H.R. Rep. No. 659, 83rd Cong., 1st Sess., 3 (1953). Passed H.R. Conf. Rep. No. 2276, 83rd Cong., 2nd Sess., 2 (1954).

There has been uniform judicial rejection of petitioners arguments because of rule 12(b)(6) of Fed. R. of Civil Procedure. But the petitioners have steadfastly held that there were disputed facts in the case but the district court withheld them from the jury; ie, (1) Whether income should be defined by 61(a) of the I.R.C. or by stare decisis of our federal judicial system. (2) Whether our amended tax returns and subsequent position that "wages are not income" was frivolous and (3) The issue of bad faith is ordinarily a question of fact. No one denies that the trial judge has the duty to exercise sound discretion and deny trial where there is no issue of fact but only a question of law. But the petitioners are convinced that the district court has abused that power; that the court was not cautious in the exercise of that power, thereby leaving the petitioners' rights unprotected.

Corpus Juris Secundum 88, S. 202, p. 419:

> "It is within the power of the trial court, in proper circumstances, to withdraw a case from the jury, as where the sole question is one of law and there are no questions of fact to be decided by the jury; but the circumstances of the case must be clear and decisive in order to justify a with-

drawal, and doubts should in all cases be resolved in favor of the submission of the case to the jury."

In Dimick v. Schiedt, Supra at 486,

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence....any seeming curtailment of the right of jury trial should be scrutinized with the utmost care."

Certainly a reasonable man engaged in a search for the truth could have found conflicting evidence. As there was competent and legally sufficient evidence tending to support the petitioners' case, the motion to dismiss should properly been denied. In the case Teis v. Smuggler mining Co., (CCA-8th), 158 F. 260:

"Where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, it presents a question of fact properly determinable by the jury."

The respondents' facts were not established beyond dispute, were not conclusive, not so overwhelming as to justify summary judgment; thus the court should have considered the facts in a light most favorable to the petitioners.

Goldberg v. Kelly, 397 US 254, 271 said:

"An impartial decision maker is essential."

Are the petitioners "tax protestors"? Form 1040A was not a protest return. They were not a "war tax" claim or a blanket 5th Amendment assertion. In filing their amended returns, the petitioners in no way expressed a desire to delay or impede the administration of federal income tax laws. This is an unwarranted assumption on the part of the Internal Revenue Service. There was no delay here because the tax had already been paid. The matter could have been resolved with a simple refusal of the request for refund. However, the petitioners received their penalty notice before their notification of disallowance, which plainly shows the governments eagerness to inflict this fine on the petitioners. The petitioners' 1040X forms did not constitute a frivolous return, because the 1040X was completed and submitted by the petitioners as the only available form of notice for the purpose of perfecting the claim of the petitioners to monies erroneously withheld from amounts due and tendered to the petitioners for services rendered pursuant to contract (Quid Pro Quo) during the years 1980, 1981, and 1982.

These amounts referred to line 7 of the petitioners' original 1040 form which indicated WAGES. The exclusion of wages must be glaringly obvious to anyone familiar with Section 61(a) of the Revenue Code. Wages are property so lawfully there was no tax due.

Were the petitioners' amended returns frivolous? At the initial administrative level, no reason was given as to why our returns were frivolous. It would seem that Section 6703(a) would apply here. With the burden of proof upon the Secretary, how can a determination possibly be made without conducting a hearing? Surely it is safe to assume that there are marginal cases where doubt might arise. How can the petitioners' amended returns indicate a position which is "clearly unallowable" or "have no basis in law or fact" where no hearing was held to ascertain this. Our position that "wages are not income" is in no wise frivolous. In Lonsdale v. C.I.R., 661 F.2d at 72, the court warned the appellant that his "contentions were stale ones, long settled against them and as such, they are frivolous." But have the peti-

tioners' claims that "wages are not income" been long settled by THIS court? The very fact that the petitioners relied on the precedent setting cases of the Supreme Court in regard to income and property, surely must bear heavily here.

It would seem that the Internal Revenue Service has been given a carte blanche in regards to 26 U.S.C. 6702. Not only that but there are those attorneys in government service, and some among the judiciary in the lower federal courts, who are all to fond of, and dangerously quick, to use the word frivolous when attacking the valid causes of the "Pro Se". It would appear that the lower courts have afforded scant attention to the petitioners' briefs, as a result of the erroneous "tax-protestor" label given them by the I.R.S.

The courts have imposed sanctions and costs on the petitioners because it was alleged that their suit was brought in "bad faith". When the petitioners initiated this action in the district court, it was their earnest desire to bring a genuine issue before the court; ie,

are wages income? In good faith, they believed what the higher courts have ruled.

> "The requirement of an offense committed willfully is not met, therefore, if a taxpayer has relied in good faith upon a prior decision of the court."
> U.S. v. Bishop, 412 US 346.

The petitioners viewed their course of action as simply a natural right of a citizen to rely on the law as written and to rely on the interpretation of the law as decided by the courts in determining matters of fact and law pertinent to the filing of their 1040X income tax returns.

Bad faith has been defined as conduct

> "without at least a colorable basis in law."
> Analytics, Inc. v. NPD Research, 708 F2d 1263

Also, Badillo v. Central Steel & Wire, 717 F2d 1160

> "A claim unsupported by probable cause."

If you act vexatiously, wantonly or for oppressive reasons, you act in bad faith states the court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 US 240. The petitioners feel that their position, from the initial filing of their amended tax returns up until this present time has shown no bad faith as defined in the above cited cases.

In Corpus Juris Secundum 88, S. 202, p. 503:

"The issue of good faith or bad faith is ordinarily a question of fact and it is usually left to the jury to say whether good faith or bad faith is present. Moreover, it has been held that when good faith is an essential element of a cause of action, it is unusual that the evidence is so conclusive that it can be said as a matter of law that there is or is not good faith and that such a finding in favor of the litigant on whom the burden of proof rests is seldom, if ever, justified. Where the matter is controvered, it is a question for the jury whether the party acted in good faith."

It is perplexing to the petitioners that neither court took into consideration the fact that this was the petitioners' first appeal of the issues presented in this case. Under these circumstances, the petitioners are compelled to question the discretion of the courts in applying the exception to the American rule regarding costs and ettorneys fees.

The word income, regardless of what the Internal Revenue Service may try to make us believe, does not mean all monies that come in. In Granzow v. C.I.R., 739 F2d 265, the petitioner had excluded his wages from income and the court on p. 268 stated:

> "Taxpayers here had no reasonable basis to believe that wages were not properly subject to income taxes given the universal and long-standing rejection of this argument." (Emphasis mine)

In U.S.v. Romero, 640 F2d 1014, the court made this statment:

> "Compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of this republic to be income, subject to the income tax laws currently applicable."

In Ficalora v. Comm., 751 F2d 85, the court said:

> "Section 61(a) of the code specifically cites 'compensation for services'...as a concrete example of what is meant by the term income."

In light of the above determinations, how will justice prevail when a person, who through study and acquisition of knowledge (a constitutional right), finds his wages (property) are not income and therefore not subject to 26 United States Code. It seems that the constitutional definition of income, as defined

by this court, has been lost to the judiciary of the lower courts. The Supreme Court in Shaffer v. Carter, 252 US 37, Supra, said that this issue of the income tax is a matter of definition. If it please the court, the petitioners would like to review briefly their argument "wages are not income". The petitioners contention that wages are not taxable stems from a consistent stream of Supreme Court rulings over the years, beginning in 1915 with Brushaber v. Union Pacific R.R. Co., 240 US 1, which ruled that the 16th Amendment separated the source from the income, permitting the collection of an indirect tax on income, but leaving the source (wages, salaries, fees for services and first-time commissions) free of any such tax. It is clear that the 16th Amendment was never intended as a tax on what a person earns by his own personal labor but was intended as a tax on the positive proceeds from investment money or on government sponsored privileges. Brushaber was followed by Stanton v. Baltic Mining Co., 240 US 103 (1916), Southern Pacific v. Lowe, 247 US 330 (1918), Eisner v. Macomber, 252 US 189 (1920) and Goodrich v. Edwards,

255 US 527 (1921).

The petitioners respectfully request this Court to take judicial notice that neither the legislative nor executive branches of government have any power or authority to decide what is, or is not, income.

> "..it becomes essential to distinguish between what is, and what is not income... Congress may not, by any definition it may adopt, conclude the matter, since it cannot by legislation alter the Constitution from which alone it derives its power to legislate, and within whose limitations alone, that power can be lawfully exercised." Eisner v. Macomber, 252 US 189.

Also, in the case of Helvering v. Edison Bros. Stores, 133 F2d 575:

> "The Treasury Department cannot, by interpretative regulations, make income of that which is not income within the meaning of the revenue acts of Congress, nor can Congress, without apportionment, tax as income that which is not income within the meaning of the 16th Amendment."

Few Americans realize that Congress has never defined income and no such definition can be found in the Internal Revenue Code.

> "The general term 'income' is not defined in the Internal Revenue Code."
> U.S. v. Ballard, 535 F2d 400, 404.

The Internal Revenue Code sets out that the calculation of taxable income begins with

the determination of "gross income", which is defined in Sect. 61 of the Code. "Gross income" is defined as "income from whatever source derived", but the word "income" itself is not defined, neither in this section nor anywhere else in the Code.

Thus the definition of income must be left to the courts. In Bowers v. Kerbaugh-Empire Co., 271 US 170, Justice Butler stated:

> "Income has been taken to mean the same thing as used in the Corporation Excise Tax of 1909, in the 16th Amendment and in the various revenue acts subsequently passed. After full consideration, this court declared that income may be defined as gain derived from capital, from labor or from both combined, including profit gained through sale or conversion of capital. And that definition has been adhered to and applied repeatedly."

In Central Illinois Publishing Service v. U.S., 435 US 31:

> "Decided cases have made the distinction between wages and income and have refused to equate the two."

The court stated in Lucas v. Earl, 281 US 111.

> "It is to be noted by the language of the Act it is not 'salaries, wages or compensation for personal service' that are to be included in gross income. That which is to be included is gains, profits and income derived from salaries, wages or compensation for personal service."

The Supreme Court held in Graves v. People

of the State of New York ex rel. O'Keefe, 306 US 466:

> "A tax on income is not legally or economically a tax on its source,"

Present Internal Revenue Service interpretations are actually directed towards collecting a direct tax on both the source and income when the law (16th Amendment) allows only for an indirect tax on income. There is today quite a bit of judicial error in the lower courts in regard to the 16th Amendment. There are many Federal Judges who think the 16th Amendment did away with the apportionment requirements of Art. I, Sections 2 and 9 of the Constitution.

In Mathes v. C.I.R., 576 F2d 70, the court said:

> "...Appellants next seem to argue....the income tax is a direct one that must be apportioned among the several states.(US Const. art. I, sec. 2) This requirement was eliminated by the 16th Amendment."

In U.S. v. Francisco, 614 F2d 617, the court said:

> "the purpose of the 16th Amendment was to take the income tax 'out of the class of excises, duties and imposts and place it in the class of direct taxes'".

In Parker v. Comm., 724 F2d 469, the court said:

> "The 16th Amendment merely eliminates the requirement that the direct income tax be apportioned among the States."

These Appeals Court Judges need to read Chief Justice White's opinion in Stanton v. Baltic Mining Co., 240 US 112.

> "...the 16th Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation."

Supreme Court cases have repeatedly interpreted the 16th Amendment as an indirect tax. If there is one common and recurrent thread that travels through all the myriad cases surrounding income taxation, it is that there must be a severable gain or profit, not merely the receipt of money. The petitioners' claim that their wages are property, not income, as upheld by the aforementioned Supreme Court cases, which are the law with respect to what is or is not income. And it was the petitioners firm reliance on these rulings that prompted them to amend their 1980, 1981, and 1982 Income Tax Forms and ask for a return of monies they erroneously included in gross income.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|---|
| CLARENCE D. CADE and JACQUELINE S. CADE | ) | |
| v. | ) | CIVIL ACTION NO. 84-2574A |
| UNITED STATES OF AMERICA | ) | |

ORDER

The above-styled action is presently before the court on the defendant's motion to dismiss or, in the alternative, for summary judgment and the plaintiffs' motion for a jury trial. Because the defendant in its motion to dismiss has included documents to be considered by the court, the court will treat the motion as one for summary judgment, as required by Rule 12(b), Fed. R. Civ. P.

The plaintiffs filed joint federal income tax returns for the tax years 1980, 1981, and 1982. Subsequently they amended each of these returns by eliminating all of their previously reported income. On the amended returns the plaintiffs stated that the previously reported income "was erroneously included in gross income." Under 26 U.S.C. s. 6702 the Internal Revenue Ser-

vice found that the amended returns were frivolous and then assessed penalties against the plaintiffs. The plaintiffs paid fifteen percent of the penalties, filed a claim for a refund, and brought this suit. The plaintiffs seek to have this court determine their liability under 26 U.S.C. s. 6703(2). They maintain that the penalties were improperly assessed because, according to them, "wages, salaries, tips, etc., are not income ... (but rather) they are property."

Rule 56(c), Fed. R. Civ. P., provides that summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Section 61(a) of the 26 U.S.C. states that compensation for services constitutes "gross income." "Taxpayers' argument that wages received for services are not taxable as income is clearly frivolous." See Funk v. Comm. of Internal Revenue, 687 F.2d 264, 265 (8th Cir. 1982).

In the present case, the plaintiffs' contention that compensation for labor does not constitute income is clearly frivolous. The

plaintiffs also challenge the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248. Because the plaintiffs did not raise this ground in their claim for a refund, this court is without jurisdiction to consider their constitutional challenge. See Sanders v. United States, 740 F.2d 886, 890 (11th Cir. 1984); see also Stoller v. United States, 444 F.2d 1391, 1393 (5th Cir. 1971); First National Bank of Fayetteville, Arkansas v. United States, 727 F.2d 741, 744 (8th Cir. 1984). Even if the court were to consider the plaintiffs' constitutional attack, the court finds it similarly frivolous.

The defendant requests that the court award attorney's fees against the plaintiffs. Although the general American rule is that attorney's fees are not awarded to the prevailing party, courts have recognized an exception for bad faith. See Gordon v. Heimann, 715 F.2d 531, 539 (11th Cir. 1983). "Grounds for such a bad faith award exist when a plaintiff brings a groundless suit and forces the defendant to expend time and effort conducting his defense." Id. See also Reed v.

United States, 581 F. Supp. 718, 720 (D. Colo. 1984). Because the court finds that the plaintiffs' action is clearly frivolous, an award of attorney's fees is proper.

Accordingly, the court sustains and grants the defendant's motion for summary judgment and its general request for reasonable attorney's fees. The plaintiff's motion for a jury trial is thus rendered moot. The government is directed to timely submit documentation to support its specific request for attorney's fees.

So ORDERED, this 30th day of April, 1985.

G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8465
Non-Argument Calendar

CLARENCE D. CADE and
JACQUELINE S. CADE

Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA

Defendant-Appellee

---

Appeal from the United States District Court
for the Northern District of Georgia

---

Before RONEY, HENDERSON and HATCHETT, Cir. Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendant-appellee, double costs on appeal to be taxed by the Clerk of this Court.

Entered: November 5, 1985
For the Court: Spencer D. Mercer, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: Dec. 23, 1985

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 85-8465

---

CLARENCE D. CADE and
JACQUELINE S. CADE,

Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA

Defendant-Appellee

---

Appeal from the United States District Court
for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 5, 11 Cir., 1985

( December 12, 1985 )

Before RONEY, HENDERSON and HATCHETT, Circuit Judges

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the

Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Albert J. Henderson
UNITED STATES CIRCUIT JUDGE

APPENDIX C-2

## PROOF OF SERVICE

STATE OF GEORGIA )
) AFFIDAVIT
COUNTY OF COBB )

Clarence D. Cade and Jacqueline S. Cade, Petitioners, do hereby declare and affirm that pursuant to Rule 28.4(a) of the Rules of the Supreme Court of the United States they served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT on counsel for the Respondent by enclosing 3 copies thereof in an envelope, first class postage prepaid, addressed to:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at Mableton, Georgia, on 11 March, 1986.

Clarence D. Cade
Jacqueline S. Cade

Clarence D. Cade
Jacqueline S. Cade
Affiants

Wm. Q. Dodd Crolan
Notary Public, Georgia, State at Large
My Commission Expires 8-11-89